

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
September 12, 2006 Session

**TOSHA MILLER v. METROPOLITAN GOVERNMENT OF NASHVILLE  
AND DAVIDSON COUNTY, TENNESSEE**

**Appeal from the Circuit Court for Davidson County  
No. 04C-1124     Walter Kurtz, Judge**

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**No. M2005-02334-COA-R3-CV - Filed on September 28, 2006**

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This appeal involves a parent who fell on the aggregate concrete steps while leaving her children's elementary school. The parent filed a negligence action against the Metropolitan Government of Nashville and Davidson County in the Circuit Court for Davidson County. Following a bench trial, the trial court determined that the sealed steps did not constitute a dangerous or defective condition and that the parent was at least fifty percent at fault for her injuries. The parent appealed. We have determined that the evidence supports the trial court's conclusion that the condition of the school's steps was not a dangerous or defective condition.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

James Bryan Moseley, Nashville, Tennessee, for the appellant, Tosha Miller.

Karl F. Dean, Director of Law, Andrew D. McClanahan, Lora Barkenbus Fox, and John L. Kennedy, Nashville, Tennessee, for the appellee, Metropolitan Government of Nashville and Davidson County.

**MEMORANDUM OPINION<sup>1</sup>**

Tosha Miller's children attend Cameron Middle School in Nashville, Tennessee. On Saturday, October 11, 2003, the school's maintenance employees pressure washed and sealed the aggregate concrete steps leading to the school's front door. They placed yellow warning tape around

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<sup>1</sup>Tenn. Ct. App. R. 10 provides:

The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion, it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

the steps while the sealant was drying. By Monday morning, October 13, 2003, the steps had dried, and the yellow warning tape was removed.

Later on October 13, 2003, Tosha Miller and her husband arrived for a parent-teacher conference at the school. As soon as they pulled up to the front of the school building, Ms. Miller smelled the fumes from the sealant and observed that something had been applied to the steps. Nevertheless, she decided to enter the school building using the steps, even after her husband grabbed her hand and told her to be careful. Ms. Miller was able to traverse the steps and enter the school without incident. Regrettably, as Ms. Miller was leaving the school at approximately 1:30 p.m. following the parent-teacher conference, she slipped and fell on the aggregate concrete steps and severely twisted her ankle.

On April 20, 2004, Ms. Miller filed suit against the Metropolitan Government of Nashville and Davidson County in the Circuit Court for Davidson County. She alleged that the city had created a dangerous condition by negligently sealing the steps. Following a bench trial on August 3, 2005, the trial court filed an order on August 5, 2005 concluding that the sealed steps did not create an unsafe, dangerous, or defective condition. In the alternative, the court concluded that Ms. Miller was at least fifty percent at fault because she was on notice of the condition of the steps and nonetheless decided to traverse them. Ms. Miller takes issue with both grounds of the trial court's decision.

We review the findings of fact by trial courts sitting without juries using the standard of review in Tenn. R. App. P. 13(d). We have reviewed the record and have determined that the manner in which the school personnel cleaned and sealed the steps and the landings was not negligent. We have also concluded, like the trial court, that Ms. Miller failed to present evidence of the presence of a dangerous or defective condition on or near the steps of the sort required to impose liability under Tenn. Code Ann. § 29-20-204(a) (2000).<sup>2</sup>

We affirm the order finding that Ms. Miller had failed to prove the existence of a defective or dangerous condition and awarding a judgment to the Metropolitan Government, and we remand the case to the trial court for further proceedings consistent with this opinion. We tax the costs of this appeal to Tosha Miller and her surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.

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<sup>2</sup>Ms. Miller's theory regarding the precise nature of the dangerous condition was not consistent from the time she filed her complaint to the time she filed this appeal. In various stages of the litigation, she characterized the sealant or the water used to clean the steps or a combination of the water and the sealant as the dangerous condition that caused her fall. Contrast this testimony to the testimony of the school personnel who stated unequivocally that the steps and landings were completely dry on Monday morning when they removed the yellow warning tape.